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No. ~~695~~. 289

# In the Supreme Court of the United States.

OCTOBER TERM 1912.

MARY R. PEABODY, SACO AND BIDDEFORD SAVINGS INSTITUTION, SAMUEL ELLERY JENNISON, AND THE PORTSMOUTH HARBOR LAND AND HOTEL COMPANY, APPELLANTS,

*v.*

THE UNITED STATES.

*APPEAL FROM THE COURT OF CLAIMS.*

## BRIEF FOR THE UNITED STATES.

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v.
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## BRIEF FOR THE UNITED STATES.

### STATEMENT.

This is an appeal from a judgment of the Court of Claims dismissing the claimants' amended petitions, which sought to recover the value of 200 acres of land, with improvements, used as a summer resort on Gerrish Island, in the State of Maine, and alleged to have been taken by the United States in the exercise of its power of eminent domain, without compensation and in violation of the fifth amendment to the Constitution.

The parties claimant are Mary R. Peabody and the Saco & Biddeford Savings Institution, mortgagees of the property; Samuel Ellery Jennison, the record owner until August 20, 1902; and the Portsmouth Harbor Land & Hotel Company, a corporation to whom on the date last named Jennison conveyed the whole property, subject to the above mortgages.

The facts out of which the claims arose, as found by the court below, may be summarized as follows:

By the act of February 21, 1873 (17 Stats., 468), Congress appropriated "for batteries in Portsmouth Harbor, Portsmouth, New Hampshire, on Gerrish Island and Jerry Point, fifty thousand dollars," and by the acts of April 3, 1874 (18 Stats., 25), and February 10, 1875 (19 Stats., 313), $30,000 and $20,000 additional, respectively, for the same purpose. Under the authority thus conferred the United States, in May, 1873, purchased a tract of approximately 70 acres of land on Gerrish Island, which forms the southwestern extremity of the State of Maine, at the entrance to Portsmouth Harbor, and in June of the following year began to construct thereon a 12-gun battery estimated to cost $45,200, under the supervision of the Chief of Engineers of the Army, which battery, with the one opposite, on Jerry Point, formed the outer line of defenses to Portsmouth Harbor and the navy yard at Kittery, Maine.

In 1876 the work had reached an advanced stage of construction, and $50,000 had been expended thereon. The breast-height walls of the fortification

had been finished and the gun platforms built except laying the irons. Operations were closed in September of that year, however, for lack of funds, and although plans were subsequently prepared and an appropriation of $36,000 requested for the completion of the work during each fiscal year from 1876 to 1886, in the annual reports of the Secretary of War, no appropriation was made nor was work resumed upon said fortification until 1898, when an allotment was made from funds provided at the outbreak of the War with Spain by act of May 7, 1898, entitled "An act making appropriations for fortification and other works of defense for the armament thereof and for the procurement of heavy ordnance for service and for other purposes" (30 Stats., 400), and the work of constructing a battery, consisting of three 10-inch guns mounted on disappearing carriages and two 3-inch rapid-fire guns, was begun in September of that year, on the site of the former uncompleted battery commenced in 1873, which was practically completed and transferred to the Artillery in December, 1901, and named "Battery Bohlen." The fortification in which it is contained is called "Fort Foster" and forms part of the defenses of Portsmouth Harbor. (Finding XI, Rec., pp. 27 and 28.)

In 1884, eleven years after the Government purchased its land and began the construction of its fortification thereon, Samuel Ellery Jennison, one of the claimants herein, became the owner of the tract of 200 acres involved in this suit immediately adjoining the

land of the Government on the south and east (Findings III and IV, Rec., p. 25), which tract was suitable for summer residences or a summer resort on account of its mile of frontage on the Atlantic Ocean and other natural advantages, but was otherwise of little value. (Findings VII and VIII, Rec., p. 26.) He thereafter erected on the westerly end thereof, within 200 feet of the boundary of the Government reservation, and 1,000 feet of the uncompleted fortification, a frame building called the Pocahontas Hotel, and farther to the eastward seven cottages as well as various other buildings accessory thereto (more particularly described in Finding VI, Rec., p. 25), all of which at the time the reconstruction of Fort Foster were already built and in operation.

No part of Fort Foster encroaches upon the abutting land of the claimants. (Finding XI, Rec., pp. 27, 28.) The boundaries of the respective tracts, the location of the fort and its guns, the hotel and other buildings are shown on the map incorporated in the opinion of the court, opposite page 30 of the Record.

After the transfer of Fort Foster to the Artillery, on the 22nd day of June, 1902, the Government caused two of its guns to be fired for the purpose of testing them at a target off the coast in such a direction that the missiles therefrom went over and across the lands of the claimants, and on the 25th of September following fired another of its guns for the same purpose and in the same manner, the effect of such fire being to do damage by concussion to the

buildings thereon situated, and the furniture therein, to the extent of $150. None of these guns have since been fired, nor have any troops been assigned to the fort. The guns, however, have been kept in good condition since their installation by a detail from Fort Constitution situated just across the Piscataqua River. (Finding XIII, Rec., p. 28.)

On the 20th of August, 1902, Jennison conveyed the entire tract in controversy to the Portsmouth Harbor Land & Hotel Company, a body corporate, organized under the laws of the State of Maine, in whom the title has since remained. (Finding IV, Rec., p. 25.)

The claimants conducted the hotel until the end of the season of 1904, since which date it has been closed.

Prior to the season of 1903 the hotel yielded the claimants a net profit of about $5,000 per annum, and the cottages, all of which were rented for the summer seasons, a reasonable rate of profit. During the seasons of 1903 and 1904 there was a loss to the claimants in conducting the hotel, and only a portion of the cottages during each summer season have since been rented at reduced rates as compared with previous years. (Finding IX, Rec., pp. 26 and 27.)

Subsequently, on March 2, 1905, the claimants began separate suits in the Court of Claims, which were afterwards consolidated by stipulation, to recover the alleged value of the whole tract of 200 acres and improvements, which it was claimed had

been taken by the United States without compensation and in violation of the fifth amendment. The allegation upon which the suits were based was that by the location of the fort and the installation of its guns so that the zone or field of fire of the same was necessarily over the claimants' land, the United States thereby took a right in the nature of a perpetual easement, which included not only the claimants' land, but the air over their land as well, and constituted a taking of private property for public use within the meaning of the fifth amendment.

The Government interposed general demurrers to the petitions as not stating facts sufficient to constitute causes of action. The court sustained the demurrers, with leave, however, to amend the petitions, declaring in an opinion by Fahey, J., that under the most liberal construction of the allegations there had been no taking of the property of the claimants or any of its uses within any of the authorities upon the subject, and in the concluding paragraph of the opinion said:

> If the averments of the petition had shown an intention and plan on the part of the Government, in time of peace, to fire the guns of the fort over and across the premises of the claimant for practice or any other purpose, and thereby interfere with her exclusive use of the same; or if it had been alleged that there was any intention and plan on the part of the Government, in time of peace, to continue to fire the guns of the fort in any direction so as to repeat and make permanent the damage by

> concussion to the claimants' property and thereby destroy its use, an entirely different question would be presented and one which is not here decided. (*Peabody* v. *U. S.*, 43 C. Cls., p. 19.)

In the amended petitions subsequently filed claimants attempted to bring their claims within this latter expression of the court and to allege a taking of their property by averring in substance that it was and is the intention and a necessary part of the plan of the Government to fire the guns of Fort Foster at any and all times over and across the premises of the claimants for practice and other purposes, and that none of said guns can be so fired for any effective purpose without the projectiles from the same passing over the claimants' intervening land. Hence that Fort Foster can not be used for the purpose for which it was erected without the use by the United States of said property and the easements appurtenant thereto.

Upon the evidence adduced by both parties at the trial upon the merits the court found the fact to be that under the law of Maine applicable to the boundary lines of adjoining riparian proprietors between high and low water, the guns of Fort Foster may be fired for practice and for all other necessary purposes in time of peace without the projectiles from the same passing over or across the claimants' land, and in the course of its opinion said:

> Such being the case, it can hardly be contended that the firing of these guns, each of

them once, in another direction so as to send the projectiles over the claimants' land constitutes a "taking" of their property. We can only judge of what property, if any, the Government has designed to have taken, by that over which it has asserted some dominion, or from the possession or enjoyment of which it has actually deprived the owner. If the single discharge of its guns over the lands of the claimants caused them any damage, as it doubtless did, it was a loss over which, as against the Government, this court and no court has any jurisdiction.

The presence of Fort Foster and the probability and perhaps certainty that at times the guns there installed will be fired in time of peace for practice, and that such firing by concussion will injure the property of the plaintiffs, as well as disturb the quietude of summer resorters in its locality, is but consequential damage for which the Government is not liable.

Hence the petition is dismissed.

Three separate motions for new trials were subsequently filed by the claimants and overruled by the court, and thereafter the claimants perfected this appeal.

## ARGUMENT.

### I.

**The question arises upon the threshold of this argument as to whether the owner of record of the property at the time of the alleged taking is not estopped from asserting in this court that it has been taken by the United States in violation of the fifth amendment to the Constitution.**

By the findings of fact of the court below it is established that the appellant, Samuel Ellery Jennison, in whom the title to the whole property was vested, conveyed on August 20, 1902, nearly three years before these suits were filed (subject to the mortgages of the appellants, Mary R. Peabody and The Saco & Biddeford Savings Institution, respectively), the entire tract of land to the Portsmouth Harbor Land and Hotel Company, a body corporate, incorporated under the laws of the State of Maine, in whom the legal title has ever since remained. (Finding IV, Rec., p. 25.)

It has been asserted, in the opening statement of the appellant's brief, page 7, that the title of the Hotel Company is unimportant, as the land was taken, according to their view of the law, in June, 1902, or two months before that company had acquired its title. This view of the law is manifestly unsound, all of Jennison's rights, of whatever nature, in and to the land in question, under the terms of the finding, passed to the Hotel Company.

The question now naturally arises, did not Jennison, by his conveyance of all of his right, title, and interest in and to the entire tract to the Hotel Com-

pany, necessarily abandon his claim for the taking of the land for public use without just compensation, as he placed himself in a position where he could not convey to the United States the fee and the possession in the event that judgment should be rendered in his favor.

This court in the case of *United States* v. *Lynah* (188 U. S., 445–490) held that:

> The proceedings must be regarded as an actual appropriation of the land, including the possession and the fee, and, when the amount awarded as compensation is paid, the title, the fee, and whatever rights may attach thereto pass to the Government, which becomes henceforth the owner.

This court also in the case of the *United States* v. *Sowell* (217 U. S., pp. 601, 602), in a *per curiam opinion*, said:

> It is ordered that before the Government is required to pay for the land held to have been taken plaintiffs below shall furnish a survey definitely ascertaining the land by metes and bounds.

The Court of Claims, in the case of *Hoyeard* v. *United States* (46 C. Cls., 484, 501), after rendering judgment, said:

> Before payment of the amount properly due according to the survey, plaintiff will execute a conveyance granting and conveying his title to the United States.

The owner of the land in this case, at the time of the alleged taking, appears to have been placed in

a position of electing to sue the Government for the taking, in which event he would be required to convey the title and possession, or to keep the property or sell to some one else, which last he did, and by so doing abandoned his right to sue the Government.

TITLE OF THE APPELLANT HOTEL CO.

Some time after the trial of the case and the rendition of judgment by the court below dismissing the petitions, the Hotel Company, through the same counsel representing it in this case, brought an action of trespass, *quare clausum*, in the Supreme Judicial Court of Maine against one Swift to recover damages for driving stakes and mooring a boat upon a part of the very flats appurtenant to Gerrish Island involved in this suit. The case came up before the Maine court upon an agreed statement of facts, which, while failing to show the source of the title of either party, was prosecuted to final judgment by the Hotel Company upon its direct assertion of ownership, not merely to a part of the flats, but to the whole of the identical tract which it is now contended upon this appeal was "taken" by the United States more than ten years before.

The Supreme Court of Maine, applying the rule first laid down in the case of *Emerson* v. *Taylor* (9 Maine, 42), which it declared had been the settled rule for the division of adjoining riparian lands between high and low water in Maine for eighty years, held that the boundaries of the land owned by the Hotel Company did not include the flats upon which the alleged trespass had been committed,

but that such flats lay within the boundaries of the land of the defendant Swift, who is not a party to the suit at bar, and rendered judgment accordingly. (*Portsmouth Harbor Land & Hotel Co.* v. *Swift*, 82 Atlantic Reporter, 542.)

The attention of the court is particularly invited to a plan incorporated in the opinion upon which is laid down the outlines of the plaintiff's and defendants' land with relation to the Government reservation.

Thus it will be seen that the Hotel Company in a direct proceeding asserted ownership to the identical tract which it now declares in this court it never owned, and that its title has been sustained and the boundaries thereof permanently and definitely fixed by the judgment of the highest court of Maine.

Under these circumstances we think it clearly results that the Hotel Company by its own acts and declarations is estopped from asserting upon this appeal that this same property was taken by the United States in 1902.

INTERESTS OF APPELLANT MORTGAGEES.

The two remaining appellants, Mary R. Peabody and the Saco and Biddeford Savings Institution, are mortgagees of the property, the former of twenty acres of the tract to secure a debt of $12,000.00 and the latter of the remainder of the tract to secure a debt of $22,000.00. Mrs. Peabody's mortgage is dated December 30, 1897 (Finding VI, record, p. 25), or twenty-four years after the United States pur-

chased the adjacent tract and began to erect its fortification thereon.

The Savings Institution's mortgage is dated January 22, 1900 (record, p. 9), or nearly two years after work was resumed upon the fortification with funds provided by the act of May 7, 1898, *supra*. Each of these mortgagees, therefore, acquired their interests in the property with full knowledge of the purpose for which the adjacent land of the Government was to be used, and being charged with such notice should not now be heard to say that the mere completion of the fortification has resulted in a taking by the United States of the mortgaged premises.

Appellants deny the accuracy of that part of Finding XI (record, pp. 27–28), which relates to the resumption of the work and the reconstruction of the fortification, upon the ground that the finding is self-contradictory in stating in one place that the fortification begun in 1873 and "*abandoned*" in 1876 was resumed in 1898; because they assert from the facts stated it is evident that the present battery was an entirely new project, begun in 1898 and completed in 1902. (Brief, p. 7.)

This objection is wholly without merit, as the terms of the finding itself disclose. The construction of the fortification was never abandoned, but, as the court expressly finds, after reaching an advanced stage, at a cost of $50,000.00, operations were closed in September, 1876, for lack of funds, and although plans were subsequently prepared for the completion of the work, and an appropriation requested, for ten successive fiscal years, "work was

not *resumed* upon said fortification until after the passage of the act of May 7, 1898," when the original project was carried to completion by the construction of Battery Bohlen on the site of the former uncompleted battery begun in 1873.

## II.

**The fundamental proposition upon which appellants rely in this court to establish the taking of their property rests upon a false premise and is opposed to the findings of fact.**

The finding of fact based upon the rule of *Emerson* v. *Taylor*, *supra*, the application of which is not denied that "the guns of Fort Foster may be fired for practice and for all other purposes in time of peace without the projectiles from the same passing over or across the claimant's land" (Finding XII, Rec., p. 28), having eliminated the fundamental proposition upon which appellants relied to establish the use and taking of their property in the court below, appellants are compelled to shift the basis of their claim in this court.

Accordingly, they now contend, in substance, that while it was physically possible to thus fire the guns, yet to do so would be extremely dangerous to life and property, from which the argument is deduced that as such firing could not be accomplished with safety, or for any effective purpose without the projectiles passing over appellants' land, the installation of the battery necessarily contemplated the use of appellants' property, and constituted a taking thereof within the meaning of the fifth amendment.

This contention and appellants' entire argument predicated upon it is unsound for two reasons:

First. The court has not found "that it was necessary to fire the guns for practice in time of peace," as counsel declare at page 9 of the brief, but merely that the guns *may be* thus fired. Indeed Finding XIV (Rec., p. 28) expressly declares:

> It does not appear from the evidence that there is any intention on the part of the Government to fire any of its guns now installed, or which may hereafter be installed, at said fort in time of peace over and across the lands of the claimants so as to deprive them of the use of the same or any part thereof or to injure the same by concussion or otherwise, excepting as such intention can be drawn from the fact that the guns now installed in said fort are so fixed as to make it possible so to do and the further fact that they were so fired upon the occasions [more than 10 years before] as hereinbefore found.

Second. The language of Finding XII (Rec., p. 28) that the guns "may be fired *for practice and for all other necessary purposes* in time of peace" without shooting across the claimant's land, necessarily preclude appellants under repeated decisions of this court from attempting to go behind the findings of the trial court and reopen upon appeal an issue of fact decided adversely to them. (*United States* v. *Adams*, 6 Wal., 101, 112; *McClure* v. *United States*, 116 U. S., 145; *Sisseton Indians* v. *United States*, 208 U. S., 566; *District of Columbia* v. *Barnes*, 197 U. S., 146, 150.)

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MAP IN APPELLANT'S BRIEF INCOMPETENT.

For this reason and also because it has not been identified or its authenticity in any manner established, the map contained in appellants' brief opposite page 7, which inspection will show differs materially from that forming a part of the opinion of the court below, is wholly incompetent for any purpose and should be disregarded in the consideration of the case.

DECISION OF COURT BELOW SHOULD BE AFFIRMED.

For these reasons it is clear that the entire theory of the alleged taking and the argument advanced in its support rest upon unsound premises, and, as appellants do not dispute the application of the rule of *Emerson* v. *Taylor* to the actual facts in the case, the decision of the court below should be affirmed. Indeed, the appellants practically concede this result, although upon different ground, at page 29 of their brief, where they say, with reference to the judgment of the lower court:

> The decision can only stand if we assume that the United States Government realized at the time it installed the battery that it owned this area over which the court found that it could fire in time of peace without shooting over the claimant's land, and that it did not intend to fire over any other land.

In view of the settled rule of law which has prevailed for over 80 years in Maine for the division of the lands of adjoining riparian proprietors, similarly situated, of which knowledge upon the part of the

Government is necessarily presumed, and in view of the further presumption that the Government does not intend to use its property in an unlawful manner, or so as to needlessly injure the private property of its citizens, the assumption which appellants thus suggested must necessarily be taken as true, and upon appellants' own concession the decision below should stand.

Aside from these considerations, however, and under the most liberal interpretation of the findings, it is manifest that

III.

**There has been no taking of appellants' property or any of its uses within the rule established by the decisions of this court.**

The rule is well settled under repeated decisions of this court that to entitle an owner to the protection of the fifth amendment there must be some actual physical invasion of the land, and a visible appropriation of some of its uses, equivalent to a practical ouster from possession. (*Pumpelly* v. *Green Bay Company*, 13 Wall., 166; *United States* v. *Lynah*, 188 U. S., 445; *Sharp* v. *United States*, 191 U. S., 341; *Manigault* v. *Springs*, 199 U. S., 473; *United States* v. *Welch*, 217 U. S., 338; *United States* v. *Grizzard*, 219, U. S., 180.)

But, as this court declared in the case of *Transportation Company* v. *United States* (99 U. S., 642):

> Acts done in the proper exercise of governmental powers and not directly encroaching upon private property, though their consequences may impair its use, are univer-

> sally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agent or give him any right of action. This is supported by an immense weight of authority. Those who are curious to see the decisions will find them collected in Cooley on Constitutional Limitations, page 542, and notes.

It is not contended in the case at bar that Fort Foster encroaches in any manner upon appellants' land or that the United States has appropriated any part of their land in the sense that its officers or agents actually entered upon or physically took possession thereof, or ousted appellants therefrom, or by direct orders limited or restricted appellants in any manner in the use thereof; but it is asserted (brief, pp. 25, 26), upon the principle of the case of *Chappell* v. *United States* (decided upon demurrer by the United States Circuit Court, District of Maryland, 34 Fed. Rep., 673), that because the most suitable and only safe field of fire for the guns is across appellants' land, appellants are necessarily prevented, without any further act upon the part of the Government, from erecting buildings and using their land for the purpose for which it is best adapted and for which it was acquired, to wit, as a summer resort, and hence appellants have been deprived of their property without compensation. (Brief, pp. 26 and 27.)

Manifestly, the condition thus supposed, even if true, which, as we have seen, the findings disprove, is

at most wholly theoretical and presents no element of physical invasion or visible appropriation within the rule laid down by this court.

The principle of the *Chappell* case *supra* is clearly distinguishable from that at bar, for the reason, as stated in the opinion, that Chappell was prevented by direct command of officers of a lighthouse board, acting under congressional authority, from erecting buildings upon and from otherwise using a strip of his land 60 feet wide lying between two range lights which it was requisite should be kept clear at all times to enable vessels to maintain their course on an adjacent river. The court very properly held that such a restriction upon the use of private property, when authorized by the United States, entitled the owner to compensation. In the case at bar, however, there has been no restriction of any nature whatever imposed upon the appellants in the use of their land, and they are as free to-day to devote it to any purpose they may desire as upon the day they first acquired it.

Again it is argued that, as the court has found (Finding XV, p. 29) the erection of Fort Foster and the installation of its guns has materially impaired the value of appellants' land, because probable guests, lessees, or purchasers will apprehend that the artillery may fire in time of peace over and across the lands, appellants' rights of use, exclusion, and disposition have been so seriously interfered with as to constitute a taking of the land (Brief, pp. 26, 27).

The fundamental error of appellants' position in this court is thus again demonstrated. The court has found that such use, even if it be conceded to be a use, was not necessary to the firing of these guns for practice and for all other necessary purposes in time of peace, and the terms of Finding XV itself establish the fact that the material impairment therein stated is merely conjectural and necessarily indirect and remote, depending solely upon the varied individual apprehensions of various probable guests.

As was observed by Bronson, C. J., in *Radcliff v. Brooklyn* (4 N. Y., 195):

> A fort, jail, workshop, fever hospital, or lunatic asylum erected by the Government may have the effect of reducing the value of a dwelling house in the immediate neighborhood, and yet no provision for compensating the owner of the house has ever been made in such case.

Furthermore, the appellants' use of the property and their right of exclusion, after the completion of the fort, remained exactly the same as it was before. Not a single restriction has been imposed thereon nor the slightest attempt made to deprive appellants of any right of exclusion or disposition which they theretofore possessed.

Again it is said that the single shots fired from each of the three guns of the fort upon the two occasions in 1902, which as stated in the finding was for the purpose of testing the guns (Finding XIII, Rec., p. 28), is a further demonstration that the use

of appellants' land was a necessary part of the Government's project. The court below, referring to the rule of *Emerson* v. *Taylor*, rejected this same contention in the following terms:

> It will thus be seen that under this rule the Government is the proprietor of that part of the flats situated to the west of line A-F, which the findings show is sufficient territory over and across which to fire the guns at Fort Foster for practice or any other purpose in time of peace. Such being the case, it can hardly be contended that the firing of these guns, each of them once, in another direction so as to send the projectiles over the claimants' land constitutes a "taking" of their property. We can only judge of what property, if any, the Government has designed to have taken, by that over which it has asserted some dominion, or from the possession or enjoyment of which it has actually deprived the owner. If the single discharge of its guns over the lands of the claimants caused them any damage, as it doubtless did, it was a loss over which, as against the Government, this court and no court has any jurisdiction. (Rec., p. 32.)

From the foregoing considerations, we think it clearly results that the proper and contemplated use of the battery in time of peace has neither infringed the appellants' rights of use, exclusion, or disposition of their land; and hence that there has been no taking of their property in the constitutional sense.

## IV.

**The injury of which appellants complain is not th result of a taking of any part of their property o a direct invasion thereof, but is consequentia damage for which no right of compensatio attaches.**

The broad distinction between the taking of prop erty for public uses and an indirect or consequenti injury to such property by reason of some publi work has been indicated by this court in numerou cases.

In *Bedford* v. *United States* (192 U. S., 224) was said:

> The Constitution provides that private prop erty shall not be taken without just compens tion, but a distinction has been made betwe damage and taking, and that distinction mu be observed in applying the constitution provision. An excellent illustration is foun in *Gibson* v. *United States* (166 U. S., 269 The distinction is there instructively e plained, and other cases need not be cited.

In the Gibson case claimant owned a farm on island in the Ohio River valuable as a market garde She had wharves upon the river and used them for t purpose of transporting the produce of her farm to t city of Pittsburgh. Congress authorized the improv ment of the Ohio River by the construction of a di which diverted the water entirely from the claiman frontage, destroyed the only landing on the far and made it impossible for her to ship her produ

by water, thereby causing her great damage. This court held, however, that the damage sustained was not within the constitutional provision, and in the course of its opinion said:

> The fifth amendment to the Constitution of the United States provides that private property shall not "be taken for public use without just compensation." Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power. (166 U. S., p. 275.)

In that case the appellant acquired her farm before the dike was projected, and therefore without knowledge or notice of its probable construction. Here, however, the plaintiffs not only had full knowledge of the purpose for which the Government reservation had been acquired, but a fort had been practically completed upon it.

In *Chicago, Burlington & Quincy R. R. Co.* v. *Drainage Comm'rs* (200 U. S., 561) this court declared with reference to the distinction between the two classes of cases:

> Upon the general subject there is no real conflict among the adjudged cases. Whatever conflict there is arises upon the question whether there has been or will be in the particular case, within the true meaning of the Constitution, a "taking" of private property for public use. If the injury complained of

> is only incidental to the legitimate exercise of governmental powers for the public good, then there is no *taking* of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution.

So also in *Transportation Company* v. *United States* (99 U. S., 642) it was said:

> The extremest qualification of the doctrine is to be found perhaps in *Pumpelly* v. *Green Bay Company* (13 Wall., 166) and in *Eaton* v. *Boston, Concord & Montreal Railroad Co.* (51 N. H., 504). In those cases it was held that permanent flooding of private property may be regarded as a "taking." In those cases there was a physical invasion of the real estate of the private owner and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiffs' lot. All that was done was to render for a time its use more inconvenient.

The principle of these cases and the language last quoted, which is especially apposite, appear to completely dispose of appellants' contention that their property has been taken in this case within the meaning of the constitutional provision.

It may not be amiss, however, to invite attention to a few of the many other cases in which the same principle has been applied.

In *Scranton* v. *Wheeler* (179 U. S., 141) it was held:

> The prohibition in the Constitution of the United States of the taking of private property

for public use without just compensation has no application to the case of an owner of land bordering on a public navigable river whose access from his land to navigability is permanently lost by reason of the construction, under authority of Congress, of a pier resting on submerged lands away from but in front of his upland, and which pier was erected by the United States, not with any intent to impair the right of riparian owners, but for the purpose only of improving the navigation of such river.

It was not intended by that provision in the Constitution that the paramount authority of Congress to improve the navigation of the public waters of the United States should be crippled by compelling the Government to make compensation for an injury to a riparian owner's right of access to navigability that might incidentally result from an improvement ordered by Congress.

See also *Union Bridge Co.* v. *United States* (204 U. S., 361) and authorities therein cited.

In *Gibson* v. *United States*, *supra*, the court quotes with approval the case of *Monongahela Navigation Company* v. *Coons* (6 Watts & S., 101), in which the site of the plaintiff's mill was destroyed by the backing up of water caused by the construction of a dam in the aid of navigation under State authority.

The court of Pennsylvania held that no compensation could be recovered because such injury was consequential, and there was no direct invasion of the

plaintiff's property by the works in question, and said:

> In one instance, a profitable ferry on the Susquehanna, at its confluence with the Juniata, was destroyed by the Pennsylvania Canal; and in another, an invaluable spring of water at the margin of the river near Selinsgrove was drowned. These losses, like casualties in the prosecution of every public work, are accidental but unavoidable; and they are but samples of a multitude of others.

In the case of *Lansing* v. *Smith et al.* (8 Cowen, 146) it was said:

> The statute (sess. 46, ch. 111) authorizing the construction of a basin in the Hudson River, in the city of Albany, and erections, whereby the docks, etc., owned by individuals above were rendered inaccessible, or less easily approached by vessels, etc., and therefore much depreciated in value, though it provided no compensation for such a consequence, is not unconstitutional, either as taking private property for public use without compensation or impairing the obligation of contracts.
>
> This is not a direct invasion of private property, but remote and consequential merely, and arising from a public improvement. The injury is one to which individuals must submit as the price of the social compact; and, in the eye of the law, the injury is *damnum absque injuria*.

The same rule applied to acts done by railroad companies in the proper exercise of power conferred upon them by lawful authority, as is well illustrated

in *Booth* v. *R. R. Co.* (140 N. Y., 262). In that case the defendants owned a lot in the city of Rochester adjacent to the property of the plaintiffs. In the projected extension of its road it became necessary, in order to comply with conditions imposed by the city authorities, to depress the defendant's roadbed below the surface of the street, and for this purpose material was excavated and blasted from the defendant's lot, as a consequence of which the plaintiff's house on the adjacent lot was seriously injured, its foundations cracked, beams and joists pulled apart, plaster loosened, and the house generally wrenched and rendered insecure. No rock or other material was thrown by the blast upon the plaintiff's lot. The court said:

> It must be assumed from concessions made on the trial and from the rule of law laid down by the court that blasting was the only mode of removing the rock practically available, that it was conducted with due care, and that it was necessary to enable the defendant to conform the roadbed to the established grade. This is a case, therefore, of unavoidable injury to the plaintiff's house, occasioned by the act of the defendant in blasting on its own premises in order to adapt them to a lawful use, the mode adopted being the only practicable one and the work having been prosecuted with due care and without negligence. The question is whether the act of the defendant, connected with the resulting injury, was a legal wrong for which the plaintiff has a right of action.

In deciding that the facts were not sufficient to sustain a cause of action the court announced the following rule:

> The test of the permissible use of one's own land is not whether the use or act causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is, Was the act or use a reasonable exercise of the dominion which the owner of the property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also public policy?

To the same effect is the ruling in *Hardman* v. *N. E. R. R. Co.* (L. R. [3 C. P. Div.], 168); *Beseman* v. *Railroad Co.* (50 N. J. L. R., 235); *Carroll* v. *R. R. Co.* (40 Minn., 168).

In *Benner* v. *Atlantic Dredging Co.* (134 N. Y. Rep., 156), the principle was extended to cases—

> Where a contractor doing, in appropriate and proper manner, public work required by a contract with said Government, which it is authorized to make, and exercising due care in the prosecution thereof, injures private property, he is not liable therefor.

The injury in that case was to the plaintiff's house, caused by the jar and concussion resulting from the blasting of rock at Hell Gate in East River, and it was held that there could be no recovery for the reason that the defendant was acting under the authority of

the Government by virtue of a contract authorized by Congress. The court said:

> It being lawful for the sovereign to exercise its lawful power, it must follow that whatever results from its proper exercise is not unlawful, and if any injury, direct or consequential, results to the individual, he is remediless, except so far as the sovereign gives him a remedy.
>
> The Government has provided for such direct injuries as amount to the taking of private property for public use by the constitutional provision that it must not be done without full compensation. If the present were such a case, it would seem that the plaintiff's remedy would be to make the proper application to the Government. The defendant having done no more than it was fully authorized to do, and which its duty to the Government under the contract required it to do, would be blameless and the Government liable because of its constitutional obligation.
>
> But this is not a case of taking private property, or of direct, but is of consequential injury. The plaintiff's house was 3,000 feet distant from the place of the explosions. The injuries to it were caused by the shaking of the earth or pulsations of the air, or both, resulting from the explosion. There was no physical invasion of the plaintiff's premises by casting stones or earth or other substance upon them, as in *Hay* v. *Cohoes Co.* (2 N. Y., 159); *Tremain* v. *Cohoes Co.* (id., 163); *St. Peter* v. *Denison* (58 id., 416), and hence no going outside

> of the authority actually conferred and conferrable as in those cases. * * *
>
> One can not confine the vibration of the earth or air within inclosed limits, and hence it must follow that, if in any given case they are rightfully caused, their extension to their ultimate and natural limits can not be unlawful, and the consequential injury, if any, must be remediless.

CONCLUSION.

In the case at bar there has been no encroachment whatever upon the lands of the plaintiffs, nor the slightest interference or restriction upon the use of the property.

The Government has merely completed, in a careful and prudent manner, a public work of vital importance to the whole people, upon its own property, purchased for that express purpose many years before the appellants acquired any interest whatever in the abutting land. To quote the language of the Supreme Court of New Jersey in *Stevens* v. *Paterson Railroad Co.* (34 N. J. L., 532, 549):

> Every citizen is required at times to contribute something, by way of sacrifice, to the public good. Such partial evil is the price which is paid for the advantages incident to the social state. It is not necessary to refer extensively to authorities in confirmation of the doctrine that, as a general rule, the public domain is subject altogether to the control of the legislature, and that incidental damage resulting to individuals from the exercise of

such control gives no legal claim to compensation.

We submit that the judgment of the Court of Claims dismissing the petitions was correct, and that it should be affirmed.

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